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No. 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL.,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

REPLY BRIEF FOR PETITIONERS.

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As anticipated in our opening brief (pp. 21-22, 82-83), respondents in these cases, a majority of the National Labor Relations Board, and the several State Attorneys General who have filed briefs *amicus curiae*, all argue from a false premise. The false premise is that if Congress intended to allow the states to exercise regulatory power in the borderline industries over which the Board normally declined to assert jurisdiction only pursuant to the proviso to Section 10(a), Congress must have intended to create a "no mans land" in which state power could not operate at all.[1] The premise is false for two reasons: first, Congress could not, and did not, anticipate that state legislatures would refuse to enact

1. See, *e.g.*, Brief for the NLRB, pp. 18, 22-23, 43. We refrain from direct comment on the brief filed by respondent herein because, although that brief was filed months before the brief for the NLRB, it cites and is obviously based upon the Board's brief. See respondent's brief, pp. 19, 37.

laws consistent with the Taft-Hartley Act; second, every state is "empowered" to fill the "vacuum" any time its legislature sees fit to enact a consistent law, so that the NLRB can exercise the power Congress gave it to cede jurisdiction to the state agency created by such a law. Once it is recognized that the "vacuum" flows not from total Congressional inhibition of state *power*, but from the refusal of the states to adopt policies which conform to the policies of Congress, the conclusion that Congress authorized state regulation in borderline industries only pursuant to cession agreements is immune to rational attack.

I. The Alleged Distinction Between "Deliberate" and "Necessary" Declination of Jurisdiction.

A majority of the present Board[2] contends (Br. pp. 37-40), that the Section 10(a) proviso should be deemed to have application only to those areas as to which the Board "deliberately" decides that state regulation is preferable to federal, and not to those "borderline industries" over which the Board declines for "budgetary or other reasons" to assert jurisdiction. The contention is as absurd as it is disingenuous.[3]

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2. Presumably the brief filed for the Board reflects the views of the relatively recently appointed Republican majority. See footnote 13, p. 20, of the Board's brief, and compare the majority and dissenting opinions in *Breeding Transfer Co.*, 110 NLRB 493.

3. Despite the majority's disclaimer in the *Breeding* case, and the express disclaimer in the Board's present brief (p. 38), that the new majority's expansion of the area in which the Board declines to assert jurisdiction reflects any judgment that in this area state rather than federal authority should rule, the Brief of the 7 States asserts flatly (p. 17): "The majority action [in the *Breeding* case] was a considered relinquishment of the field for the exercise of the state's reserved powers". We think it significant that the total lack of *bona fides* and candor of the present Board majority is so blatant that even the States in whose interest the Board's brief was filed cannot acquiesce in the pretense. Neither can the employer-respondent in the *Garmon* case, No. 50, Brief, pp. 20-21.

A. The legislative history set forth in our principal brief, pp. 62-65, shows that the Congress which passed the Act designed the proviso to Section 10(a) to cover precisely those "border line industries, *i. e.*, borderline insofar as interstate commerce is concerned," over which, as Congress knew, the Board declined to assert jurisdiction for "budgetary or other reasons." This Court has repeatedly recognized that Section 10(a) was drafted to govern cases "over which the National Board has *declined* jurisdiction." (Brief for Petitioners, pp. 63, 65-66.) Every subsequent Congress has recognized that the Section 10(a) proviso operates in just that field. (Brief for Petitioners, pp. 80-82; Brief for the AFL-CIO as *amicus curiae*, pp. 14-16, 20-22; Brief for the United Steelworkers of America in No. 280, this Term, p. 37.)

The Board's brief admits (pp. 25-26, 27), that "*Bethlehem* left undecided the question of state power in cases where the federal Board declined jurisdiction 'for budgetary or other reasons'." But it deliberately ignores the fact that Congress, as the Committee Reports clearly show, and as this Court has repeatedly recognized, avowedly enacted the proviso to Section 10(a) to resolve the question left undecided in *Bethlehem*. Congress would hardly have been satisfied that it had "clarified" the situation, if, as the Board's brief now says (p. 28), the new proviso left that problem unresolved "as it was before."

B. The assumption on which the newly invented distinction rests—that prior to Taft-Hartley the Board ceded to states like New York which had laws consistent with the Wagner Act jurisdiction over cases arising in industries over which the Board customarily *asserted* jurisdiction, not over industries in which it consistently *declined* jurisdiction—is simply not true. The Memorandum between the National Board and the New York Board, and the National Board Minute of August 16, 1946, reprinted

as an Appendix to the concurring opinion in the *Bethlehem* case, 330 U. S. 767, 786-795, 796-797, both show that the areas which the National Board conceded to the State Board were those in which the National Board had consistently *declined* to assert its jurisdiction. Repeatedly the Memorandum states that the National Board will *not* allow the State Board to assert jurisdiction over enterprise after enterprise on the ground that in these enterprises "the National Board would customarily assert jurisdiction" or had "originally asserted jurisdiction." The Minute of August 16, 1946, is both illustrative and decisive. The Minute notes that the reason the National Board would not object to having the New York State Labor Relations Board entertain cases involving brokerage houses is that *"The Board * * * would not, at this time, entertain a petition filed on behalf of the employees * * * of such houses because of budgetary and other administrative considerations."*[4]

The assertion that the proviso was directed only to areas of industry over which the Board had consistently *asserted* jurisdiction is a bald attempt, ten years after the event, to rewrite history.

C. The Board's brief argues (pp. 39-40), that the distinction which it draws between "deliberate" cession and cession for "budgetary or other reasons" does not destroy the proviso completely because the Board's present

4. The fact that under the Wagner Act the Board ceded to only a few states jurisdiction over cases which the Board, in any event, administratively declined to handle can hardly be thought to demonstrate that the states with which administrative understandings were not reached acquired more jurisdiction over those enterprises than states like New York. On the contrary, agreement with other states was totally impossible because they, like Ohio and California to this day, had no laws or agencies which could or would protect the employee rights which Congress had created or perform the administrative functions which Congress had vested in the Board.

policy standards do not eliminate the entire area over which the Board is permitted by the proviso to cede jurisdiction to states which have consistent laws. But, since the Board is merely "empowered" not "directed" to assert jurisdiction, what, in principle, would prevent the Board from choosing to decline jurisdiction over all of the industries subject to cession under the proviso by invoking the rubric "budgetary or other reasons"? In any event, is a desire to "enlist the aid of state agencies" (Bd. brief, p. 38) not a "reason" other than budgetary for declining to assert jurisdiction? Perhaps the suggested distinction is rooted in the fact that a "deliberate" refusal to assert jurisdiction, in order to reallocate authority between the states and the nation, would, as Pennsylvania argues, be a clear case of malfeasance. Brief for the Commonwealth of Pennsylvania as *amicus curiae*, pp. 6-13. The purpose of suggesting the distinction appears to be to change the office of the proviso from a method of enabling the states to fill the gap created by the Board's inability, for budgetary or other legitimate administrative reasons, to exercise fully its responsibility under the law, into an authorization to the Board to draw new and different lines between federal and state power for wholly political reasons. See pp. 7-8, *infra*.

D. Ignoring the fact that in brief after brief filed with this Court from 1949 through 1954 the Board flatly declared that the proviso prohibits the states from asserting jurisdiction over cases which the Board declines for budgetary or other reasons to handle (see our main brief, pp. 33-34), the new majority attempts to make it appear that its present contrary position is not new. Thus, the brief says (p. 36, note 21), that the Board has consistently refrained, "as a matter of practice" from "intervening in any way in situations where the States, despite the absence of a cession agreement, have taken action with re-

spect to cases over which the Board declines to assert jurisdiction." That practice, however, reflected limitations of budget and staff, not a determination that, on principle, state action was authorized despite the proviso. As pointed out publicly by one of the writers of this brief in 1952, when he was an Assistant General Counsel of the Board: "The Board's budget and heavy workload simply do not permit it to assign [to intervention in preemption cases] the substantial staff which would be necessary if it were to participate in the literally hundreds of cases involving issues of this character in the state courts."[5] Accordingly, except for filing briefs as *amicus curiae* in appropriate cases in this Court, the Board intervened in preemption cases only where a state agency or a state court "attempted to exercise jurisdiction over a cause which has been adjudicated by the National Board or is pending before it for adjudication."[6]

II. The Alleged Distinction Between Substantive Rights and Procedure.

The distinction urged by the Board's brief between substantive rights and procedure (see pp. 31-36, 41-46), is simply an attempt to substitute for Congress' judgment that a state should be able to assert jurisdiction only if its applicable statute is not "inconsistent with the corresponding provision of this Act" or has not received "a construction inconsistent therewith," a different and narrower standard of the new Board members' own devising. The distinction suggested not only reveals indifference to denial of substantive rights which may result from differ-

5. Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, New York University Fifth Annual Conference on Labor (Matthew Bender & Co., 1952), pp. 77, 112.

6. *Ibid*, at p. 114.

ences in "construction" of corresponding substantive rules; it ignores the fact, demonstrated in our main brief, pp. 55-59; 69-72, that Congress considered equally vital to the national welfare those objectives which it attempted to achieve through procedural limitations as those which it attempted to achieve through the creation of substantive rights.

The Board's brief says (pp. 20, 46) that Ohio in the *Fairlawn* case has infringed no substantive rights despite the fact that Ohio offers no protection whatever for any of the employee and union rights to organize and peacefully to picket which the national Act protects. See our main brief, pp. 42-55, 69-70; Brief for the United Steelworkers of America in No. 280, pp. 28-35. The new Board majority is undisturbed by the fact that Ohio treats all peaceful picketing for organizational purposes as a "conspiracy," and consequently, in this case, enjoined *all* picketing, even though, if the National Board had handled this case, and found the Union's objective illegal, it would have limited its order so as to permit peaceful picketing for organizational purposes. See our main brief, pp. 48-55. It is similarly undisturbed (Brief, p. 4, note 4), by the fact that the Ohio courts predicated one of the findings upon which the conclusion of illegality rested—that the Union at all times lacked a majority—upon Fairlawn's unfair labor practices, and the other finding—that the Union's object was to obtain a union shop clause—upon evidence which the Board would not regard as warranting that conclusion. See our main brief, pp. 45-48. The language of the Section 10(a) proviso shows that Congress realized, as the present Board majority does not, that it cannot be enough that no conflict appear on the face of the state law or policy; differences in construction or application of rules identically worded may produce results

as destructive of substantive rights as differences in the rules themselves.

The distinction proposed by the Board's brief would permit the states to vitiate, among others, Congress' policies designed to eliminate Communist officers from the trade union movement and to avoid the exacerbation of labor disputes inevitably caused by the granting of injunctive relief to private employers. For a number of years the Republican administration has proposed that Congress eliminate the consistency requirement of the proviso, so that states could assert jurisdiction under inconsistent laws where the Board declined to assert jurisdiction, despite the frustration of important federal policies which that would entail. See Brief for the AFL-CIO, *amicus curiae*, pp. 20-22; Brief for the United Steelworkers of America in No. 280, p. 27; Brief for the NLRB, p. 38, note 22. Thus far that solution has not commended itself to Congress, presumably for the same reasons which led the "watchdog committee" of the 80th Congress to reject it. See our main brief, pp. 79-81.

The Board's brief is, therefore, a blatant attempt to induce this Court to effectuate the very political program which this Administration has tried, unsuccessfully, to achieve through legislation. This brief is the second step, the first having been the *Breeding* case, of the Republican majority's plan to relinquish "a field for the exercise of the states reserved powers." Brief for 7 States, p. 17. But Congress in the Act decided "what matters are to be taken over by the central Government and what to be left to the States." See our main brief, pp. 23-24, 30-31. The attempt of a majority of the Board to draw a new and different line for political reasons is a perversion of the administrative process. Its attempt to rewrite legis-

lative history for the purpose of inducing this Court to approve its political program is an abuse of the judicial process.

Respectfully submitted,

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